IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1217

I. M. WARD,

Petitioner,

vs.

AUCTIONEERS ASSOCIATION OF SOUTHERN CALIFORNIA et al,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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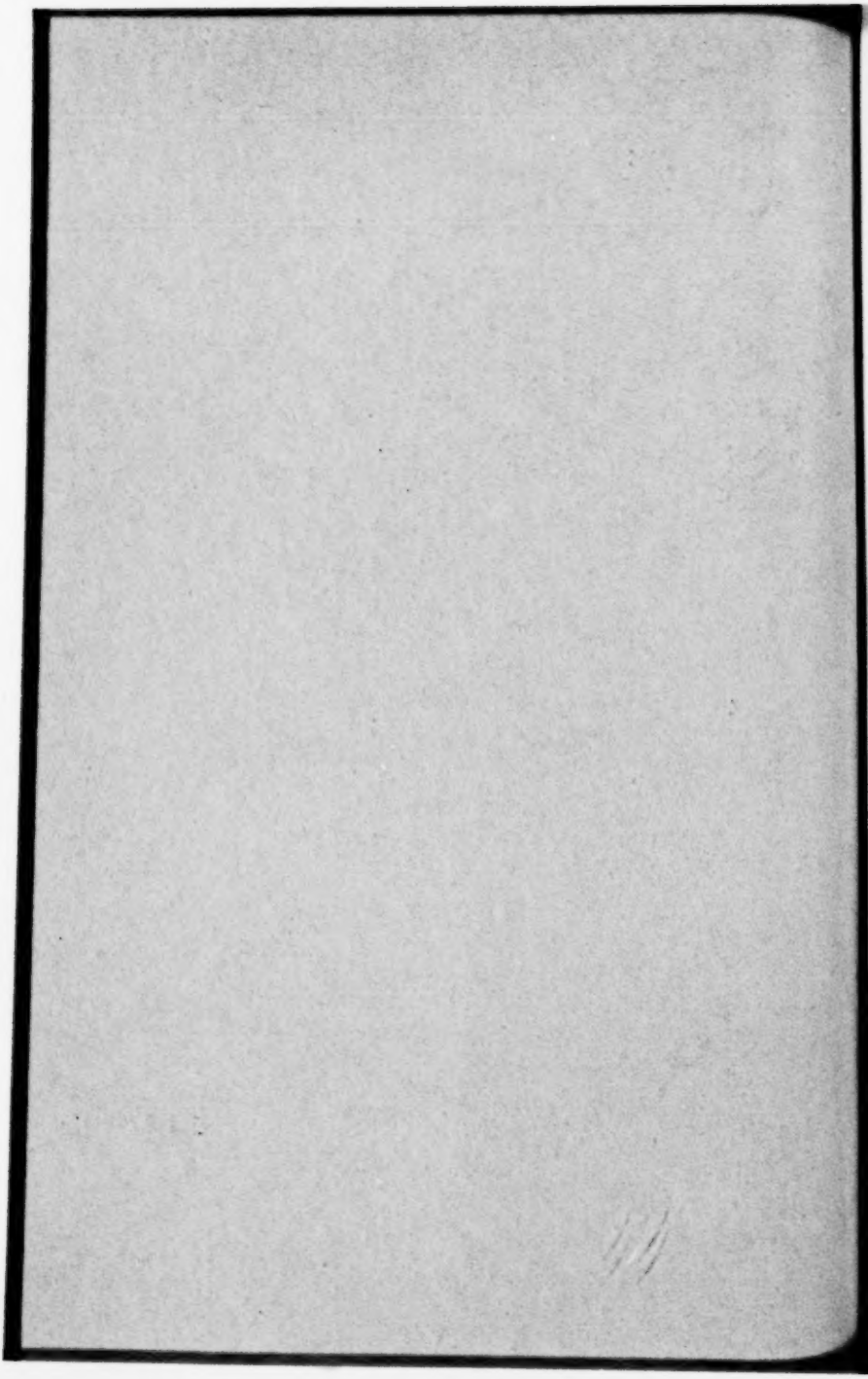

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To the Honorable Harlan Fisk Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supeme Court of the United States:

Respondents respectfully contend that the Petition for Writ of Certiorari filed herein presents nothing to sustain any of the grounds upon which the Writ is sought and the Petition should be denied.

We respectfully submit that the Judgment of the District Court of Appeal of the State of California, sought to be reviewed by certiorari, is correct; that it is fully supported by, and is in conformity with, the decisions of this Honorable Court; that no new or undetermined federal question has been presented, but that the main

points stated in said Petition primarily concern California state law; and that all constitutional questions urged are conclusively settled by the decisions of this Court adversely to petitioner's contention.

Before proceeding further, it is not untimely to state that the printed copy of the Petition, Brief, and Record were *not served upon counsel for respondents within ten days after the Petition was filed*, as required by Rule 38, paragraph 3, of Rules of Supreme Court.

Nevertheless, we will proceed to answer the Petition upon the merits.

Statement of Case.

On September 2, 1943, petitioner, as plaintiff, filed an action against the respondents, as defendants, in the Superior Court of the State of California, in and for the County of Los Angeles, entitled: "Complaint for Damages for Unlawful Monopoly under the Cartwright Act", for $100,000.00 damages. [R. pp. 1-7.][1] A Demurrer thereto [R. pp. 7-14] was sustained. [R. p. 15.] On November 29, 1943, an Amended Complaint was filed [R. pp. 15-21] which is identical with, and an exact replica of, the original Complaint, with the sole exception of a very minor and immaterial change found in paragraph XI thereof. [R. p. 19.] On December 11, 1943, respondents filed a Demurrer to the Amended Complaint [R. pp. 21-36] and a Notice of Motion to Strike First Amended Complaint from Files. [R. pp. 42-45.] On December 23, 1943, a Minute Order in said Superior

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[1]All references to Record refer to the printed Transcript of Record.

Court was entered in Department 35, the Honorable Alfred L. Bartlett, Judge Presiding, sustaining the Demurrer without leave to amend and denying respondents' Motion to Strike First Amended Complaint from Files. [R. p. 37.] On January 21, 1944, Judgment in favor of respondents and against petitioner was signed and entered. [R. pp. 37-39.]

Thereafter an appeal was taken to the District Court of Appeal of the State of California, Second Appellate District [R. p. 39] and on December 4, 1944, the Judgment of the Superior Court was affirmed. [R. pp. 45-49.]

On January 13, 1945, petitioner filed a Petition for Hearing by the Supreme Court [R. pp. 49-58] and on February 1, 1945, the Petition for Hearing was denied. [R. p. 60.]

The substance of the Amended Complaint is fully set forth in the Opinion of the District Court of Appeal [R. pp. 45-48] and need not be repeated herein.

Petitioner's statement, ". . . but denying a Motion for Dismissal of the Complaint" (on page 4 of the Petition for Cert.), is incorrect. It was respondents' *Motion to Strike First Amended Complaint from Files,* and for a dismissal, which was denied. [R. p. 37.] This Motion, based upon the ground that the amended and the original Complaints were identical, had been filed concurrently with, and as an alternative for, the Demurrer. [R. p. 42.]

The Cartwright Act.

The Cartwright Act was enacted in 1907 (Stats. 1907, chap. 530.) The severity of its all-inclusive provisions soon caused the Legislature of California, in 1909, to reenact this statute with certain amendments thereto, which created various exceptions to the acts therein denounced as crimes. (Stats, of 1909, chap. 362.)

In 1941, the California Legislature again reenacted this law by including it in the Business and Professions Code, being sections 16700 to 16768, inclusive. In so repealing and reenacting the Act in the Business and Professions Code, the Legislature of California by statute (sec. 16701) incorporated a new section and provided a rule of construction for the various provisions of the Act and for the determination of the separability of its various provisions. The pertinent portions of this section reads as follows:

> **"Sec. 16701. Separability of provisions: How determined: Trust redefined.**
>
> Section 24 of this code shall not determine the separability of the provisions of this chapter, one from another. Such separability shall be determined by whether the provisions of Chapter 530 of the Statutes of 1907 and the provisions of Chapter 362 of the Statutes of 1909 are separable among themselves and as to each other. . . ."

Section 24 of the Business and Professions Code which, by the foregoing section has expressly been rejected as a rule of construction in determining the validity or invalidity of the Cartwright Act, reads as follows:

> **"Sec. 24. Invalidity of provision or application.** If any provision of this code, or the ap-

plication thereof, to any person or circumstance, is held invalid, the remainder of the code, or the application of such provision to other persons or circumstances, shall not be affected thereby."

It is the contents of this rejected section upon which petitioner, both in this Court and in the various California courts, based his argument relating to separability of the provisions of the Cartwright Act.

The pertinent provisions of the Business and Professions Code involved herein read as follows:

"**Sec. 16720. Trust defined: Purposes.** A trust is a combination of capital, skill or acts by two or more persons for any of the following puposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected."

"Sec. 16723. **Agreement, etc., for reasonable profit excepted.** No agreement, combination or association is unlawful or within the provisions of this chapter, the object and purpose of which are to conduct operations at a reasonable profit

or to market at a reasonable profit those products which can not otherwise be so marketed."

"**Sec. 16724. Interest of seller or manufacturer in transportation, etc., facilities.** It is not unlawful, or within the provisions of this chapter, for persons engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation which has as its object or purpose the transportation, marketing or delivery of such commodity."

"**Sec. 16725. Associations, etc., to promote competition or further trade.** It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."

"**Sec. 16726. Trusts not excepted void.** Except as provided in this chapter, every trust is unlawful, against public policy and void."

Section 16750 of said Code provides for a civil remedy to an injured party, and Section 16755 provides for the criminal prosecution and criminal penalty for any violation of said Act.

It is the present Cartwright Act, the provisions of the Business and Professions Code, which was assailed by respondents and declared unconstitutional by the District Court of Appeal. Contrary to petitioner's contention, it was the entire Act, not merely sections 16723 and 16724, which were declared unconstitutional.

Reasons for Denying the Petition for Writ of Certiorari

A. The District Court of Appeal correctly held that the Cartwright Act, upon which this action is founded, is unconstitutional and void in that it violates the due process clause of the Federal Constitution. Said Act, by reason of the various exceptions therein contained, leaves the whole statute so indefinite and uncertain as to be without a fixed standard of obedience.

B. The District Court of Appeal correctly held that the provisions of the Cartwright Act (secs. 16723, 16724 of Business and Professions Code) cannot be separated from the rest of the Act (sec. 16720, Business and Professions Code) without destroying the entire Act and doing violence to the legislative intent. Such a determination is a matter of State law and binding upon this Court.

C. The District Court of Appeal correctly held that the principles of due process of law requiring reasonable certainty of description, in fixing a standard for exacting obedience from a person in advance, applies equally to civil proceedings.

D. The District Court of Appeal correctly held that the decision of this Court in *Cline v. Frink Dairies* (274 U. S. 445; 47 S. Ct. 681; 71 L. Ed. 1146) is controlling in this action.

E. The decision of the District Court is in accord with, and fully supported by, the decisions of this Court.

F. The Cartwright Act is not an important piece of legislation but has been dormant since the decision of the *Cline v. Frink* case and its invalidity has generally been conceded and accepted by both the bench and bar of California since the aforesaid decision.

Summary of Argument.

I.

The construction and meaning of a State statute, and whether any part thereof is separable from the remainder, is a matter upon which the State courts, and not the Federal courts, speak with final authority.

II.

The decision in *Cline v. Frink Dairies* is controlling in this case and the District Court of Appeal correctly held that the Cartwright Act is unconstitutional in that the various exceptions therein contained leave the whole staute so indefinite and uncertain as to be without a fixed standard of obedience, thereby violating the due process clause of the Federal Constitution.

III.

The principle of due process of law, requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance, applies equally in civil proceedings.

IV.

The Cartwright Act has not been considered important legislation since the *Cline v. Frink Dairies* decision and its invalidity generally has been recognized in California. It "has been more honored in the breach than its observance".

I.
ARGUMENT.

I.

The Construction and Meaning of a State Statute, and Whether Any Part Thereof Is Separable From the Remainder, Is a Matter of State Law, and the State Court's Construction Thereof Must Be Accepted by This Court in Determining Whether Such Statute Is Repugnant to the Federal Constitution.

(a) The Construction Placed Upon the Cartwright Act by the District Court of Appeal, That Sec. 16720 Business and Professions Code Is Not Independent of, or Severable From, Sections 16723 and 16724 of the Same Code, Is Binding Upon This Court in Determining Whether the Cartwright Act Violated the 14th Amendment.

The California District Court of Appeal held that section 16720 of the Business and Professions Code was not independent of, or severable from, sections 16723 and 16724 of the same Code. [R. p. 48.] Notwithstanding such construction placed upon the Act by the California court, petitioner now contends that such construction is incorrect and is reviewable by this Court. Such a contention cannot be sustained.

It is fundamental and well settled that this Supreme Court is without power to place a different construction upon a State enactment from that adopted by the State court. The meaning of the statute as so fixed by the State court must be accepted by this Supreme Court as if such meaning had been specifically expressed in the enactment and must be taken by this Court to express the intention and purposes of the State's lawmakers.

This rule is clearly stated and firmly applied in *Morehead v. New York Ex Rel. Tipaldo,* 298 U. S. 587, 609; 80 L. Ed. 1347, 1354. On page 1354 of 80 L. Ed., the Court states:

> "Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. Supreme Lodge, K. P. v. Meyer, 265 U. S. 30, 32, 68 L. ed. 885, 887, 44 S. Ct. 432. Exclusive authority to enact carries with it final authority to say what the measure means. Jones v. Prairie Oil & Gas Co., 273 U. S. 195, 200, 71 L. ed. 602, 608, 47 S. Ct. 338. . . . As our construction of an Act of Congress must be deemed by state courts to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purpose of her lawmakers. Green v. Neal, 6 Pet. 291, 295-298, 8 L. ed. 402, 404, 405."

The same rule is also stated and applied in *International Harvester Co. v. Kentucky,* 234 U. S. 216, 220, 58 L. ed. 1284, 1286; *Quong Ham Wah Co. v. I. A. C. of California,* 255 U. S. 445, 448, 65 L. ed. 723, 724; *Olson v. Smith,* 195 U. S. 332, 342, 49 L. ed. 224, 229; *Meyers v. Wells Fargo & Co.,* 223 U. S. 298, 302, 56 L. ed. 445, 448; *King v. West Virginia,* 216 U. S. 92, 54 L. ed. 396; *W. W. Cargill Co. v. Minnesota,* 180 U. S. 452, 466. 45 L. ed. 619, 625.

The foregoing rule is also applicable where the question to be determined is whether any part of the State statute is separable from the remainder thereof and the State court's determination of separability or non-separability likewise is conclusive and binding upon this Court.

The language of the late Justice Cardozo, then Chief Justice of the New York Court of Appeals, in *People v. Mancuso,* 255 N. Y. 463, 175 N. E. 177, 76 A. L. R. 514, 521, wherein a large number of United States Supreme Court cases are reviewed, perhaps best states the rule thusly:

> "To what extent a severance of good from bad is permissible with a view to the preservation of a statute is a question of construction as to which the courts of the state, and not the federal courts, must speak with ultimate authority. People *ex rel.* Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 60, 129 N. E. 202; Meyer v. Wells, Fargo & Co., 223 U. S. 298, 302, 32 S. Ct. 218, 220, 56 L. ed. 445; Berea College v. Kentucky, 211 U. S. 45, 55, 29 S. Ct. 33, 53 L. ed. 81; Loeb v. Columbia Township Trustees, 179 U. S. 472, 490, 21 S. Ct. 174, 45 L. ed. 280; Huntington v. Worthen, 120 U. S. 97, 7 S. Ct. 467, 30 L. ed. 588."

In *Olson v. Smith, supra,* this Court stated the rule as follows:

> "Whether the illegal clauses granting discriminatory exemptions could be eliminated without destroying the other provisions of the state laws regulating pilotage is a state, and not a Federal, question. For the purpose of determining the validity of the statutes in their Federal aspect this court accepts the interpretation given to the statutes by the state court, and tests their validity accordingly."

In *International Harvester Co. v. Kentucky, supra,* involving the anti-trust laws of Kentucky, the construction of several statutes enacted at different times was involved and it was contended that the construction placed upon such statutes by the Kentucky court was incorrect. This Court followed the construction placed thereon by the Kentucky court, stating:

> "We follow the Kentucky Court of Appeals in taking what they derive from the legislation of the State as if it were embodied in a single act." (58 L. Ed. 1286.)

In *W. W. Cargill Co. v. Minnesota, supra,* the State Supreme Court held that the State act therein involved was severable. This Supreme Court followed that interpretation, declaring it "to be elementary that it should adopt 'the interpretation of a statute of a state affixed to it by the court of last resort thereof' ".

In *Meyers v. Wells, Fargo & Co., supra,* Justice Holmes stated:

> "Whether the statute could be construed as separable, of course, would be ultimately in the State court, in any event."

The same rule was announced in *King v. West Virginia, supra.*

We respectfully submit that the question of separability of the provisions of the Cartwright Act is not open for review by this Court and that the California District Court of Appeals' interpretation thereof is binding upon this Court.

(b) The Construction Placed Upon the Cartwright Act by the District Court of Appeals, That the Provisions Thereof Are Not Separable, Is Correct.

The District Court of Appeal correctly held that sections 16723 and 16724 of the Business and Professions Code were not independent of nor severable from section 16720 of the same Code. Whether the aforesaid two sections can be separated from section 16720 of the aforesaid Code in legal effect without destroying the entire Act and the legislative intent is settled conclusively by *Cline v. Frink Dairies, supra,* and *Blake v. Paramount Pictures,* 22 Fed. Supp. 249. In *Blake v. Paramount Pictures, supra,* the United States District Court, Southern District of California, in a case arising in California, held and declared the Cartwright Act itself to be unconstitutional and void [quoted extensively in R. pp. 30-33, inclusive]. The aforesaid two cases held that the act involved therein must be construed as a whole and that provisions therein involved cannot be separately construed.

Sections 16723 and 16724 are a part of parcel of, and a part of the very definition of, the acts and combinations condemned in section 16720. If, of course, the California Legislature intended that section 16720 should stand by itself, it could have done so by simply reenacting section 16720 and omitting sections 16723 and 16724. It certainly had the opportunity to do so when the Cartwright Act was reenacted in the Business and Professions Code in 1941. But it did not see fit to do so. The Legislature must have been familiar with the decision in the *Cline* and *Blake* cases, *supra*—yet it reenacted the Cartwright Act in its entirety. By section 16701 it excluded as a rule of interpretation the usual separable clause found in legislative enactments, to-wit, section 24 of the Business and

Professions Code. It did not want to omit sections 16723 and 16724 and reenact section 16720 by itself because if it had done so, it would have made criminals out of thousands of the innocent and would have condemned as illegal those thousands of associations looked upon today as legal in California; it apparently took the position that the entire Act, including sections 16720, 16723 and 16724, were all valid or all invalid. As stated in *People v. Yosemite Lumber Co.*, 191 Cal. 267, at 279:

> ". . . We are impelled to the conclusion that the act was intended by its framers to stand or fall as a whole. . . ."

The deletion of section 24 of the Business and Professions Code as a rule of construction clearly demonstrates that the California Legislature, in reenacting the Cartwright Act in the Business and Professions Code, intended the statute to stand or fall as a whole and announced a rule against the mutilation of the statute. The effect of the inclusion or omission of a provision similar to the excluded section 24 of the Business and Professions Code in a legislative enactment was recently considered by this Court, in the case of *Carter v. Carter Coal Co.*, 298 U. S. 238, 321, 80 L. ed. 1160, at 1189. The rule announced therein is so pertinent that we quote therefrom:

> "Finally, we are brought to the price-fixing provisions of the code. The necessity of considering the question of their constitutionality will depend upon whether they are separable from the labor provisions so that they can stand independently. Section 15 of the act provides:
>
> > 'If any provision of this Act, or the application thereof to any person or circumstances, is

held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.'

In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the non-statutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability."

The rule as to separability is well stated in the case of *Hale v. McGettigan*, 114 Cal. 112, at page 119, where the rule is stated as follows:

"Whether a statute containing an unconstitutional provision, with others which are constitutional, will be sustained as to those which are constitutional and held invalid merely as to those which are not, depends upon the nature of the different provisions in view of the evident purpose of the legislature. If the provisions are so interdependent that those which are invalid are to be regarded as the condition or consideration upon which others were enacted, and it is evident that the legislature would not have enacted the statute except in its entirety, and did not intend that any part should have effect unless the whole could be made operative, the entire statute must be held invalid."

In the late case of *In re Portnoy*, 21 Cal. (2d) 237, at page 242, the Supreme Court of California stated the rule thusly:

> ". . . The rule is well settled, where such a severability clause is included, that the valid portions of a statute or ordinance which is partially unconstitutional will be upheld if the remaining portion is severable and constitutes a completely operative expression of the legislative intent. (*Bacon Service Corp. v. Huss*, 199 Cal. 21, 32 (248 Pac. 235).) *On the contrary, however, where the invalid portions of the statute are so connected with the rest of the statute as to be inseparable, it is clear that the entire act must fall.* (*Bacon Service Corp. v. Huss, supra; In re White*, 195 Cal. 516 (234 P. 396); *Robison v. Payne*, 20 Cal. App. (2d) 103 (66 P. (2d) 710).)" (Italics ours.)

To the same effect is:

Robison v. Payne, 20 Cal. App. (2d) 103 at 106;

Pasadena City High School District v. Upjohn, 206 Cal. 775 at 779;

Carter v. Carter Coal Co., supra.

And so we have the same thing in the case at bar. If the legislature wanted to re-enact the Cartwright Act without including the exceptions contained in sections 16723 and 16724, it could have easily eliminated the objectionable provisions; it did not choose to do so. *Here sections 16723 and 16724 relate to and affect and limit equally each and every division and subdivision of section 16720.* The invalidity of the entire Act is, therefore, crystal clear.

Petitioner attempts to avoid the effect of the foregoing by arguing that it was only the 1909 amendment which fell under the *Cline v. Frink* case and the rest of the Act should stand.

It is a rule in California that a statute cannot simply be amended, but that the entire Act *as amended must be reenacted.* Article IV, section 24, of the California State Constitution so provides as follows:

> ". . . No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised and amended; . . ."

Under this section the amended act is intended as a substitute for the original statute, continuing in force that which is reenacted.

> *People v. Western Fruit Growers,* 22 Cal. (2d) 494, 500, 501;
>
> *Sherer v. Flannery,* 68 Cal. App. 91, 94;
>
> *Pierce v. County of Solano,* 62 Cal. App. 465, 469.

Where the amended statute, as reenacted, contains invalid portions which are so interwoven and connected with the rest of the statute that the invalid portions thereof cannot be separated without destroying the rest of the act, the entire act must fall.

This Supreme Court had no hesitancy in striking down the Lever Act *as amended,* which was involved in *U. S. v. Cohen Grocery Co.,* 255 U. S. 81, 41 S. Ct. Rep. 295, 63 L. ed. 516, and in *A. B. Small Co. v. American Sugar Refining Company,* 267 U. S. 233, 69 L. ed. 589, 593. In

these cases it was primarily the 1919 amendment to the Lever Act which invalidated the entire Act by creating "an enlargement of the enumerated exceptions". But the entire Act fell, not merely the amendment.

As stated in *Blake v. Paramount Pictures,* in which Judge Yankwich declared the Cartwright Act itself unconstitutional, "there is no way of segregating the proviso (sections 16723, 16724) from the definition (section 16720). It was intended to affect the acts denounced as crimes." (Parentheses ours.)

Further, the Legislature, by deleting Section 24 of the Business and Professions Code as a rule of construction in determining the validity of the Cartwright Act, expressly excluded the rule of construction now urged by petitioner.

Neither does petitioner's reference to or reliance upon section 2 of the Business and Professions Code, enacted in 1937, improve his position. The said section merely provides that the new sections of the Business and Professions Code should be construed the same as the old law if the new sections are substantially the same as the old. Such is the general rule of law without the said section. However, section 24, and not section 2, of said Code, determines the *separability* of the provisions of the Business and Professions Code, and since section 24 was expressly *excluded* as a rule of construction in determining the separability of the provisions of the Cartwright Act, as reenacted in 1941, the specific and later section in the Cartwright Act (section 16701 Business and Pro-

fessions Code) must prevail over the general and earlier section relied upon by petitioner (*Pierce v. Riley,* 21 Cal. App. (2d) 513; *Coca-Cola Bottling Co. v. Feliciano,* 32 Cal. App. (2d) 351). Particularly is this true when the reenacted law requires a definite construction (*Guardianship of Reynolds,* 60 Cal. App. (2d) 569, 675). Here section 16701 requires a definite construction to be placed upon separability of the Cartwright Act.

It also has consistently been held that the reenacted and amended Act must be construed and considered as a new and original piece of legislation, for the purpose of construing the *entire Act as amended.* (*Smith v. Board of Trustees,* 198 Cal. 301, 306; *Dalton v. Jewett,* 88 Cal. 530; *Reed Orchard Co. v. Superior Court,* 19 Cal. App. 648, 656.) By deleting section 24, the Cartwright Act must be so construed, and as so construed, the entire Act falls. Also, if petitioner's contention is that only the 1909 amendment is unconstitutional, that contention alone is sufficient ground for construing the present Cartwright Act as a new enactment (*County of Los Angeles v. Jones,* 6 Cal. (2d) 695, 708).

The weakness of petitioner's contention is disclosed by the great length to which he goes in his attempt to justify his contention that the question of separability of the Cartwright Act was determined by Federal and not by California law. He concedes that the District Court of Appeal in its Opinion spoke of sections 16723 and 16724 as "inseparable" from the rest of the Cartwright Act, but contends that such a characterization was based upon the

interpretation given the Colorado Act by this Court in the *Cline* case and, therefore, was determined under Federal and not California law. The decision of the District Court of Appeal, itself, belies such argument. The California Court stated:

> ". . . Plaintiff contends, however, that his action comes within the provisions of section 16720 and that sections 16723 and 16724 are separate and independent of section 16720. We find no merit in this contention. Sections 16723 and 16724 unquestionably refer to all the subdivisions of section 16720. By their enactment, the Legislature attempted to limit the various subdivisions of section 16720 but in doing so made the limitations so indefinite that no standard was left in the statute by which a court can determine the guilt or innocence of those accused of its violations. Section 16720 is not independent of or severable from the other two sections. . . ." [R. p. 48.]

Certainly such a construction of a California statute by a California court, based upon the legislative intent of the California Legislature, can only be considered to be a matter of California law. No Federal law is therein involved.

Petitioner's contention that the various provisions of the Cartwright Act are separable and that this Court may so determine, notwithstanding a contrary construction placed thereon by the California court, we submit is without merit.

II.

The Decision of This Court in Cline v. Frink Dairies, Supra, Is Controlling in This Case, and the District Court of Appeal Correctly Held That the Cartwright Act Contravenes the 14th Amendment of the Federal Constitution.

Petitioner contends that the decision of this Court in *Cline v. Frink Dairies, supra,* is easily distinguishable from the case at bar. Such contention is without merit. Since the validity of the principles upon which the *Cline v. Frink Dairies* decision rests is not challenged, petitioner is restricted to the sole ground that the *Cline v. Frink Dairies* case is "easily distinguishable". (*Morehead v. New York ex rel. Tipaldo, supra.*)

In 1927, the Colorado Anti-Trust Law, which is a counterpart of the Cartwright Act, was declared unconstitutional and void by this Supreme Court, in the case of *Cline v. Frink Dairies, supra* [quoted extensively R. pp. 27-30].

In *Blake v. Paramount Pictures, supra,* the United States District Court, Southern District of California, in a case arising in California, held and declared the Cartwright Act, itself, to be unconstitutional and void [quoted extensively R. pp. 30-34].

This decision also held that the decision in the *Cline v. Frink Dairies* case was controlling.

In *Redlands Foothill Groves v. Jacobs,* 30 Fed. Supp. 995, the same United States District Court again reiterated that the Cartwright Act was unconstitutional and void.

The only California case reported subsequent to the *Cline v. Frink Dairies* decision which even discusses the

Cartwright Act is the case *In re Battelle*, 207 Cal. 227, at 250-251, wherein the Supreme Court of California stated that the Colorado Anti-Trust Law was by its terms "a replica of the Cartwright Act," and therein expressed doubt as to the constitutionality of the Cartwright Act. which only incidentally was involved therein, because of the decision in the *Cline* case by this Supreme Court [quoted extensively R. p. 33].

An examination of the *Cline v. Frink Dairies* decision and the pertinent provisions of the Cartwright Act set forth in the Business and Professions Code (previously quoted in this Brief) readily disclose that the said provisions which rendered the Colorado Anti-Trust Law without a fixed standard of obedience and, therefore, in violation of the Federal Constitution, are found in almost the exact language in the California Cartwright Act.

It, therefore, becomes crystal clear that the Cartwright Act, like the Colorado Anti-Trust Law involved in the *Cline v. Frink Dairies* case, is repugnant to the due process clause of the 14th Amendment of the Federal Constitution. The District Court of Appeal correctly held that said *Cline v. Frink Dairies* decision is controlling and conclusive in the case at bar.

The same rule as announced in the *Cline v. Frink Dairies* case has been applied and followed by this Court in numerous cases, both before and after the rendition of the *Cline v. Frink Dairies* decision. The rule therein announced has never been departed from. To cite the legion of cases applying the rule of the *Cline v. Frink Dairies* case would unduly extend this Brief. A few of the cases are: *International Harvester Co. v. Kentucky, supra; U. S. v. L. Cohen Grocery Co., supra; A. B. Small v.*

American Sugar Ref. Co., supra; Connally v. General Construction Co., 269 U. S. 385; 70 L. ed. 322; *Champlin Refining Co. v. Corporation Com.*, 286 U. S. 210; 76 L. ed. 1063; *Lanzetta v. New Jersey*, 306 U. S. 451; 83 L. ed. 889.

III.

The Principles of Due Process of Law Requiring Reasonable Certainty of Description in Fixing a Standard for Exacting Obedience From a Person in Advance Applies Equally in Civil Proceedings.

Petitioner claims that the *Cline v. Frink Dairies* case is not applicable herein because it involves a criminal statute and a criminal prosecution, whereas the case at bar is a civil action. That argument is untenable. The Cartwright Act, like the Colorado Anti-Trust Law, is a penal statute. It, like the Colorado Anti-Trust Law, contained penal provisions (section 16755 Business and Professions Code). Any statute, the object of which is to impose obedience, which inflicts punishment upon those who disregard the mandates of its provisions, is a penal statute, and the mere fact that civil redress may also be had thereunder does not change its character (23 Cal. Jur. 612; 50 Am. Jur. 34). The Colorado Act having been adjudicated to be a criminal statute, the Cartwright Act, containing similar and almost identical provisions, must likewise fall in the same category.

Petitioner attempts to distinguish the *Cline v. Frink Dairies* case from the case at bar upon the sole theory that that case involved a criminal prosecution; and he contends that the rule therein announced is applicable only to criminal proceedings. On page 18 of his Petition, he

states, as the basis of the *Cline* case, the following: "It is these criminal penalties and these alone, which are made the basis of the decision of this Court in *Cline v. Frink Co.*"

That very contention was advanced to and rejected by this Supreme Court in *A. B. Small Co. v. American Sugar Refining Co., supra,* which was a civil action involving the due process clause of the 14th Amendment of the Federal Constitution. In rejecting such argument, Mr. Justice Van Devanter, speaking for the Court, stated (p. 593 of 69 L. ed.):

> "The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings. Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 54; 14 A. L. R. 1054; 131 N. E. 566; Dunman v. South Texas Lumber Co. (Tex. Civ. App.), 252 S. W. 274, 275. In the first of these citations, the court of appeals of New York, referring to this court's ruling in the L. Cohen Grocery Co. case, well said:
>
> 'The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because

too vague to be intelligible. No standard of duty had been established . . . The variant views of judges of the district courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty.' "

The case of *Cline v. Frink Dairies, supra,* itself disposes of petitioner's contention in the following language (p. 1155 of 71 L. ed.).

> "The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation (*A. B. Small Co. v. American Sugar Ref. Co.,* 267 U. S. 233, 238, *et seq.,* 69 L. ed. 589, 593, 45 Sup. Ct. Rep. 295), but the fact it is often necessary to investigate and decide certain questions in civil cases is not controlling or persuasive as to whether persons may be held to civil or criminal liability for not deciding them rightly in advance."

In *Blake v. Paramount Pictures, supra,* a case involving the Cartwright Act itself, Judge Yankwich also held that the *Cline v. Frink Dairies* decision was applicable to civil proceedings; he stated:

> ". . . But there is no way of segregating the proviso from the definition. It was intended to affect the acts denounced as crimes. It being invalid, as introducing an uncertain element into them, the acts denounced cease to be illegal, and no penalty, civil or criminal, can be bottomed on them."

To the same effect are the cases of *Connally v. General Construction Co.*, 269 U. S. 385; 45 S. Ct. Rep. 126; 70 L. ed. 322; *Standard Chemicals Etc. Co. v. Waugh Chemical Corp.*, 231 N. Y. 51; 131 N. E. 566; 14 A. L. R. 1054; *Dunman v. So. Tex. Lumber Co.*, 252 S. W. 274.

In *Champlin Refining Co. v. Corporation Com., supra,* this Court again reiterated the rule that where a statute was so vague and indefinite as to be without a fixed standard of obedience, it was not merely the penalty prescribed therein which was invalid but the entire statute itself fell. On page 1083 of 76 L. ed., that rule is stated thusly:

> "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." (Citing many authorities, including the *Cline v. Frink Dairies* case.)

Petitioner leans very heavily upon the case of *Levy Leasing Co. v. Siegel,* 258 U. S. 242, to support his contention that a different rule is applicable to civil proceedings. This case has been fully and thoroughly distinguished in *Small Co. v. American Sugar Refining Co., supra,* and the inadvertent statement "dealing with definitions of crime" found in the *Levy* case is fully explained and in effect is nullified. The *Small* case explains

that the words of the aforesaid statement did "not adequately reflect the matter dealt with"; that "it was broader than they indicate; and, of course, they were not intended to qualify or limit the decision". (Referring to the *U. S. v. Cohen* case.)

While Petitioner quotes the statement found in the *Small* case, he entirely fails to quote the explanation of said statement therein given by this Court. The explanation given defeats rather than upholds Petitioner's contention herein. In none of the other cases cited by Petitioner, wherein the *Levy* case is cited, is Petitioner's contention supported. Wherever the *Levy* case has been cited, it has been used in connection with facts similar to those involved in the *Levy* case. Most of those cases involve war emergency legislation and the statutes were construed accordingly.

The case of *U. S. v. Nash* cited by Petitioner has been so thoroughly distinguished and limited in so many of the cases of this Court, including the *Cline v. Frink Dairies* case, that no useful purpose would be served in further discussion of said case.

We, therefore, respectfully submit that Petitioner's alleged distinction of the *Cline v. Frink Dairies* case from the case at bar is without foundation and that his contentions in respect thereto have been fully answered adversely by the adjudicated cases of this Court.

The decision in the *Cline v. Frink Dairies* case is controlling and decisive herein.

IV.

The Cartwright Act Has Not Been Considered Important Legislation in California Since the Cline v. Frink Dairies Decision and Its Invalidity Has Generally Been Recognized in This State Since the Rendition of the Aforesaid Decision.

Much ado is made by Petitioner about the so-called importance of the Cartwright Act, and many pages of the Petition are consumed in a dissertation upon the social and economic value of anti-trust laws. We do not herein, nor did we in any court below, question the social or economic benefits of anti-trust laws in general. Our challenge has been directed to the specific Cartwright Act involved, and it is that Act which the District Court of Appeal of California has held to be repugnant to the Federal Constitution.

No matter how laudable may be the purpose of a statute, it has never been held by this or any other Court that a laudability of purpose alone is sufficient to overcome, or to deprive one of, the constitutional guarantees afforded by the Constitution of the United States. The rights given to one under the due process clause of the 14th Amendment cannot lightly be disregarded, and if a beneficial statute is stricken down because it is repugnant to the Federal Constitution, the resulting harm must be laid at the door of the Legislature, not the courts.

The duty of the court in such case is clear. Constitutional guarantees must be upheld, and though the performance of such duties might often result in unpleasantness, such duties cannot be shirked.

Nor is there any merit to Petitioner's contention that the Cartwright Act is an important piece of legislation. As a statute it has been dormant and "without any teeth" since the rendition of the *Cline v. Frink Dairies* decision by this Honorable Court in 1927. The very fact that since the decision of this Supreme Court in the *Cline v. Frink* case there has been no reported case by any of the higher courts of the State of California concerning the Cartwright Act, indicates the conclusiveness with which the decision in the *Cline* case has been accepted in California, upon the constitutional questions involved herein.

The only reported cases since the *Cline* decision have flatly declared the Cartwright Act unconstitutional. Certainly Petitioner has submitted nothing to overcome the decisions submitted by the Respondents herein, from which it is crystal clear that the Cartwright Act in question is unconstitutional. The following statement attributed to Governor Earl Warren, the Governor of California and himself a former attorney-general of this State, found in the "Los Angeles Daily Journal" of February 28, 1945, graphically illustrates the disrepute in which the Cartwright Act has fallen since the rendition of the *Cline* decision. We quote:

> "Governor Earl Warren, himself a former attorney-general of the State, said the law, passed as the Cartwright Act in 1907, 'has been more honored in the breach than its observance'."

We can add nothing to the foregoing statement.

Conclusion.

Respondents respectfully submit that the decision of the District Court of Appeal correctly states the law and has correctly decided this case; that Petitioner has utterly failed to establish any ground which would entitle him to the issuance of a Writ of Certiorari by this Honorable Court; that the question of whether provisions of the Cartwright Act are separable is a matter of California, and not Federal, law; that the decision of this Honorable Court in *Cline v. Frink Dairies* is controlling herein; that the principles of due process requiring reasonable certainty of description in fixing a standard for exacting obedience applies equally in civil actions; and that the Cartwright Act has long been considered invalid in the State of California, since the rendition of the *Cline* decision by this Court.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the Petition for a Writ of Certiorari should be denied.

Dated: This 31st day of May, 1945.

Respectfully submitted,

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